SUPREME COURT, U. S.

NOV 12 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-571

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

against

FEDERAL POWER COMMISSION; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION; ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETER J. SCHLESINGER
Counsel for Petitioner
One Battery Park Plaza
New York, New York 10004

Of Counsel:
SIMPSON THACHER & BARTLETT

TABLE OF CONTENTS

	PAGE
Opinions and Order Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
A. Proceedings Before the Commission	3
B. The February 14, 1974 Opinion of the Court of Appeals	5
C. The August 14, 1974 Order and Opinion of the Court of Appeals	6
Reasons for Granting the Writ	8
Point I—The opinion below misinterprets this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939)	9
Point II—The opinion below conflicts in principle with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963)	19
Point III—The opinion below represents such a clear departure from the permissible scope of administrative review as to require the exercise of this Court's supervisory power	23
Conclusion	26

APPENDIX

PAGE

Order and Opinion of the Court of Appeals Dated August 14, 1974 ..... 1a

Judgment of the Court of Appeals Dated February 14, 1974 ..... 14a

Opinion of the Court of Appeals Dated February 14, 1974 ..... 16a

Order of the Commission Dated August 11, 1972 ..... 28a

Order of the Commission Dated October 6, 1972 ..... 39a

Text of Statutes Relied On

Federal Power Act §205 ..... 51a

Federal Power Act §206(a) 53a

Federal Power Act §313 ..... 54a

TABLE OF AUTHORITIES

PAGE

Cases:

Alaska Steamship Co. v. FMC, 362 F.2d 406 (9th Cir. 1966) 24, 25
Arrow Transportation Co. v. Southern Railway Co., 308 F.2d 181 (5th Cir. 1962), *aff'd* 372 U.S. 658 (1963) 20, 21, 22
Atchison, Topeka & Sante Fe Railway v. Wichita Board of Trade, 412 U.S. 800 (1973) 24
Atlantic Coast Line Railroad Co v. Florida, 295 U.S. 301 (1935) 17
Atlas Life Ins. Co. v. W.I. Southern, Inc. 306 U.S. 563 (1939) 10

Briggs v. United Shoe Machinery Co., 239 U.S. 48 (1915) 10

Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264 (1933) 22

Delaware v. Hodson, 265 F. Supp. 308 (D. Del. 1967) 10

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 25
Ford Motor Co. v. NLRB, 305 U.S. 364 (1939) 7, 9, 12, 13, 14, 15, 16, 17
FPC v. Idaho Power Co., 344 U.S. 17 (1952) 23, 24
FPC v. Interstate Natural Gas Co., 336 U.S. 577 (1949) 17
FTC v. Eastman Kodak Co., 274 U.S. 619 (1927) 24

Indiana & Michigan Electric Co., 33 FPC 739 (1965), *aff'd* 365 F.2d 180 (7th Cir.), *cert. denied*, 385 U.S. 972 (1966) 3
Inland Steel Co. v. United States, 306 U.S. 153 (1939) 16, 17

Jackson v. United States Nat'l Bank, 153 F. Supp. 104 (D. Ore. 1957) 10

PAGE

Lockerty v. Phillips, 319 U.S. 182 (1943) 9

Mississippi River Fuel Corp v. FPC, 202 F.2d 899 (3rd Cir.), *petition dismissed on petitioner's motion*, 345 U.S. 988 (1953) 17, 18
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 24
Montana Power Co. v. FPC, 330 F.2d 781 (9th Cir. 1964) 18

Pennsylvania Gas & Water Co. v. FPC, 463 F.2d 1242 (D.C. Cir. 1972) 20
Phillips Petroleum Co. v. FPC, 227 F.2d 470 (10th Cir. 1955), *on remand* 15 FPC 1116 (1956) 24, 25

Rees v. Watertown, 86 U.S. (19 Wall.) 107 (1873) 10
Richmond Power and Light v. FPC, 156 U.S. App. D.C. 315, 481 F.2d 490 (D.C. Cir.), *cert. denied sub nom.* Indiana & Michigan Electric Co. v. Anderson Power and Light, 414 U.S. 1068 (1973) 5

Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850) 9

Tennessee Valley Municipal Gas Ass'n. v. FPC, 470 F.2d 446 (D.C. Cir. 1972) 18

United States v. Morgan, 307 U.S. 183 (1939) 7, 9, 12, 16
United States v. SCRAP, 412 U.S. 669 (1973) 22

Statutes and Rules:

18 C.F.R. §35.13(b)(4)(i) (1973) 4, 5

18 C.F.R. §35.13(b)(5) (1973) 4

PAGE

Federal Power Act, 16 U.S.C. §791a, *et seq.* (1970),
§205(d), 16 U.S.C. §824d(d) (1970) 3, 4, 5
§205(e), 16 U.S.C. §824d(e) (1970) 3, 4, 15, 19
§206(a), 16 U.S.C. §824e(a) (1970) 3, 15
§313(b), 16 U.S.C. §8251(b) (1970) 3, 9, 10, 11, 14, 19, 23
§314, 16 U.S.C. §825m (1970) 11
§317, 16 U.S.C. §825p (1970) 11

Judiciary Act of 1789, §11, 1 Stat. 82 10

National Labor Relations Act §10, 49 Stat. 454, 455 (1935) 11, 14, 17

28 U.S.C. §1254(1) (1970) 2

U.S. CONST. art. 3, §1 9

Other Authorities:

1 Moore's, Federal Practice ¶0.60 [3] (2d ed.) 9

IN THE

Supreme Court of the United States

October Term, 1974

No. _____

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

against

FEDERAL POWER COMMISSION; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; INDIANA & MICHIGAN MUNICIPAL DISTRIBUTORS ASSOCIATION; ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Indiana & Michigan Electric Company, respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on August 14, 1974, which granted respondents' petitions for rehearing and modified the court's main opinion of February 14, 1974.

Opinions and Order Below

The main opinion of the Court of Appeals and the order and opinion granting the petitions for rehearing and modifying the main opinion, neither of which is as yet reported, are reproduced in the Appendix,[1] at 16a and 1a, respectively.

Jurisdiction

The main opinion and judgment (16a) of the Court of Appeals were entered on February 14, 1974. A supplemental order and opinion (1a), granting respondents' petitions for rehearing and modifying the main opinion, were entered on August 14, 1974. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether an appellate court sitting in review of administrative agency action may exercise the extraordinary powers of a court of equity when that court's jurisdiction is derived solely from an enabling statute affording no such powers?

2. Whether an appellate court reviewing administrative agency action by virtue of a specific statutory grant may fashion a remedial order which has the effect of doing indirectly that which the enabling statute forbids the agency itself from doing directly?

1. Citations with suffix "a" are to the Appendix.

3. Whether an appellate court whose scope of review is specifically limited by statute to affirming, modifying or setting aside, in whole or in part, the order of an administrative agency may, upon determining that the agency has violated its enabling statute, do more than merely lay bare the error and remand the case to the agency?

Statutes Involved

This petition involves issues which are required to be resolved under Sections 205, 206 and 313 of the Federal Power Act, pertinent portions of which are set out in the Appendix (51a, 53a and 54a), respectively.

Statement of the Case

The jurisdiction of the court below was invoked pursuant to §313(b) of the Federal Power Act (the Act). 16 U.S.C. §8251(b).

Petitioner, Indiana & Michigan Electric Company (I&M) is an electric utility engaged in the generation, transmission and distribution of electric energy for sale both at wholesale for resale and at retail. The Federal Power Commission has asserted jurisdiction over I&M's wholesale for resale sales. *Indiana & Michigan Electric Co.*, 33 FPC 739 (1965), *aff'd* 365 F.2d 180 (7th Cir.), *cert. denied* 385 U.S. 972 (1966).

A. Proceedings Before the Commission

This proceeding had its origin in the filing with the Federal Power Commission (FPC) by I&M on June 13, 1972 of proposed increases in rates and charges to its

wholesale customers. In that filing, I&M specified an effective date of July 14, 1972 for the increases, in compliance with the 30-day maximum notice period provided in Section 205(d) of the Act. 16 U.S.C. §824d(d).

On July 3, 1972, the Secretary of the FPC wrote to I&M, acknowledging its June 13, 1972 filing, but stating that August 13, 1972 would be the earliest date on which the proposed increases could be made effective under Section 35.13(b)(4)(i) of the FPC's regulations. 18 C.F.R. §35.13 (b)(4)(i). That section required that, whenever a utility filed a proposed rate increase, certain cost-of-service data, a summary of the proposed rates and comparative billing analyses be filed at least 60 days prior to the proposed effective date.[2]

On July 18, 1972, I&M moved the FPC for an order fixing July 14, 1972 as the effective date of its proposed rate increases. Various intervenors before the FPC filed responses which opposed I&M's requested effective date and, in addition, urged the imposition by the FPC of a maximum five-month suspension of the proposed rates, invoking Section 205(e) of the Act. 16 U.S.C. §824d(e).

On August 11, 1972, FPC issued its order (28a) accepting I&M's rates for filing, rejecting I&M's proposed effective date of July 14, 1972, setting August 13, 1972 as the effective date of the said rates and suspending the effective date of the proposed rates and charges for a full five months from August 13, 1972, thereby rendering the rates

2. Section 35.13(b)(5) of the FPC's Regulations (18 C.F.R. §35.13(b)(5)) similarly requires a 60-day pre-filing of the utilities' testimony and exhibits in support of a proposed rate increase.

effective and collectible subject to refund on and after January 13, 1973. Thereafter I&M applied for rehearing, and, in its order of October 6, 1972 (39a), the FPC denied that application.

On December 5, 1972 I&M petitioned the Court of Appeals for the District of Columbia Circuit to review the FPC's orders of August 11, 1972 and October 6, 1972.[3]

B. The February 14, 1974 Opinion of the Court of Appeals

On February 14, 1974, the Court of Appeals, in an opinion by Judge Wilkey (16a), held that the FPC had exceeded its statutory authority by promulgating Section 35.13(b)(4)(i) of its Regulations, insofar as that Section required the effective date of I&M's rate filing to be delayed beyond the 30-day limit specified in Section 205(d) of the Act. In addition, the court declared the FPC's August 11, 1972 order to be *ultra vires* and a nullity since it purported to suspend I&M's rates and charges after they became effective on July 14, 1972. The February 14, 1974 opinion pointed out that Section 205(d) of the Act has been construed as creating not only a minimum notice period for the FPC and the utility's customers, but also a maximum waiting period for the filing utility. Since the FPC had not issued its suspension order within the prescribed period, the court concluded that the increased rate had taken effect without being subject to suspension or refund.

3. Other aspects of the two orders were also brought on for review by certain of I&M's customers. The resolution of those issues do not affect the matters involved in this Petition. *See, Richmond Power and Light* v. *FPC*, 156 U.S. App. D.C. 315, 481 F.2d 490 (D.C. Cir.), *cert. denied sub nom. Indiana & Michigan Electric Co.* v. *Anderson Power and Light*, 414 U.S. 1068 (1973).

Accordingly, the court vacated the suspension order and remanded the proceeding to the FPC with instructions that I&M's June 13, 1972 rate filings were to be made effective as of July 14, 1972.[4]

C. The August 14, 1974 Order and Opinion of the Court of Appeals

On February 28, 1974, the FPC and various intervenors filed petitions for rehearing. By order and opinion dated August 14, 1974 (1a), the court below granted those petitions and while adhering to its main opinion insofar as it had held that the FPC exceeded its authority in suspending I&M's rates after they became effective, nevertheless modified the main opinion to alter totally its legal impact.

At the outset of its August 14, 1974 opinion, the court noted that the Act rendered the FPC powerless to correct any alleged inequities arising from the court's February 14, 1974 decision.

> "Under our main opinion, which renders the Commission's 11 August 1972 suspension order a nullity, the Commission's hearings on the reasonableness of I&M's rates cannot rest on the authority of section 205(e), but rather on section 206(a), and thus the Commission does not have the correlative power to order refunds pursuant to section 205(e). Consequently, the Commission's hearings can continue only under the authority of section 206(a), and this unambiguously provides that 'the Commission shall determine the just and reasonable rate * * * to be *thereafter* observed

4. The court below was fully aware in its February 14, 1974 opinion that the effect of its opinion would be to permit I&M to charge its affected customers at the increased rates for the six-month period from July 14, 1972 to January 13, 1973 (19a and fn. 8 at 19a).

> and in force, and shall fix the same by order.' The Supreme Court has interpreted this language as precluding the Commission from ordering refunds, even when it determines that the rates in effect are unjust and unreasonable." (5a-6a)

However, in spite of the fact that the court's opinion made it clear that prospective relief was the only remedy permitted under the express provisions of the Act on the facts here presented, the court exercised what it claimed were its inherent equity powers to invest the FPC with a suspension power and a refund power—both of which the court had held were expressly denied to the FPC by the Act. To reach its conclusion the court was required to resolve two issues: first, whether the equities of this case were sufficiently compelling to justify the exercise of inherent equity powers, and second, whether it was vested with such powers when reviewing actions of the FPC.

The court concluded first, that its prior decision had resulted in a hardship of sufficient magnitude to require intervention by an equity tribunal (3a-7a) and second, that it was vested with inherent equity powers to correct the actions of the FPC (7a-13a). While recognizing that the FPC was "statutorily powerless to correct these inequities" (2a), the court below pointed to this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939) to support its conclusion that it, sitting in review of the FPC's action, is vested with such powers. It proceeded to invoke those powers to do that which it conceded the FPC was statutorily powerless to do, *i.e.*, to issue an order the effect of which was to suspend a rate increase after it had become

effective, thereby imbuing the FPC with the concomitant power to order refunds, a power which the FPC lost when it failed timely to suspend.

Accordingly, the court modified its main opinion by ordering that I&M could not collect its rate increases for the five-month period following the July 14, 1972 effective date and that, although I&M could charge the increased rates for the period from December 14, 1972 through January 13, 1973, those charges and all other collections attributable to the increases would be subject to refund should the FPC ultimately find such increases unreasonable or not in the public interest (3a).

Reasons for Granting the Writ

The argument that follows demonstrates: (1) that the opinion of the court below misinterpreted applicable decisions of this Court in deciding an important question of federal law which has not been, but should be, unequivocally settled by this Court; (2) that the opinion below conflicts in principle with decisions of this Court; and (3) that the opinion below so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's supervisory power.

POINT I

The opinion below misinterprets this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939).

The Court of Appeals, in its August 14 opinion, interpreted this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939) as meaning that, when called on to review orders of the FPC, it was invested with the powers of a court of equity. The decisions cited do not stand for the proposition asserted. It is abundantly clear both from *Ford* and *Morgan* and from the very nature of our federal judicial system of limited powers that the court below, when reviewing orders of the FPC, is endowed with only such powers as Congress granted to it in Section 313(b) of the Act. Nowhere in that Section of that statute did Congress grant equity powers to courts of appeals. Accordingly, since Congress did not grant equity powers to the court below, it exceeded its authority and its jurisdiction by exercising such powers.

The federal courts, and more specifically the courts of appeals, are courts of limited jurisdiction which have no power or jurisdiction other than that conferred upon them by Congress. *Lockerty* v. *Phillips*, 319 U.S. 182 (1943); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 440 (1850); 1 Moore's, Federal Practice ¶0.60 [3] (2d ed.). This proposition is derived from Article 3, Section 1 of the Constitution which states, "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain."

While Congress, in Section 11 of the Judiciary Act of 1789, 1 Stat. 82, provided that the circuit courts shall have "cognizance * * * of all suits of a civil nature at common law or in equity" in cases appropriately brought, this provision does not mean that a court of appeals possesses the full panoply of equitable powers in all cases. Quite to the contrary, it merely means, when analyzed correctly, that the federal courts are courts of general equity jurisdiction and may exercise equitable powers in those equitable actions which are otherwise within their jurisdiction. See *Atlas Life Ins. Co.* v. *W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939); *Briggs* v. *United Shoe Machinery Co.*, 239 U.S. 48, 50 (1915); *Rees* v. *Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873); *Delaware* v. *Hodson*, 265 F. Supp. 308, 309 (D. Del. 1967); *Jackson* v. *United States Nat'l Bank*, 153 F. Supp. 104, 108 (D. Ore. 1957).

The Judiciary Act is not an independent source of jurisdiction. In all cases, in order for the federal courts to exercise equitable powers, there must be an independent statutory basis of jurisdiction which gives rise to those powers. In the instant case, the independent basis for the Court of Appeals' jurisdiction is Section 313(b) of the Act, 16 U.S.C. §825l(b), which provides,

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the

> application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. * * * The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

By this section, Congress granted the Court of Appeals jurisdiction to review orders of the FPC, but the jurisdiction conferred is precisely detailed and severely circumscribed. The court is given only the power to "affirm, modify, or set aside such order in whole or in part."[5] *Id.* It is not granted any broad equitable powers such as the power to grant injunctions and restraining orders (see, *e.g.*, §§314 and 317 of the Act which invest these powers in the district courts) or the power to issue such orders as to it may seem just and proper (see, *e.g.*, §10(e) and (f) of the NLRA, 49 Stat. 454, 455). Therefore, although Section 313(b) of the Act provides an independent basis for the court's jurisdiction, Congress made it abundantly clear that a court of appeals reviewing FPC action under that section sits as a court of law rather than as a court of equity. It follows that the exercise of equitable powers in a Section 313(b) proceeding is without Congressional authority.

---

5. Even this limited jurisdiction is confined and restricted. See Point III, *infra*, at 23.

Nevertheless, the court below exercised the extraordinary powers of a court of equity to fashion an order, the effect of which was to provide a remedy which is expressly denied by the Act to both the court and the FPC. The court below, both in its main opinion and its opinion on rehearing, expressly held that the FPC was, under the terms of the Act, powerless to suspend I&M's proposed rate increases after they became effective on July 14, 1972 (27a). Despite that holding, the court has, in effect, suspended I&M's rate increases some 25 months after they became effective on July 14, 1972.

In addition, both the main opinion of the court below (fn. 35 and text at 27a) and the opinion on rehearing expressly held (5a) that, once the FPC lost the power to suspend I&M's proposed rate increases, it was likewise without power to place such rate increases under a refund obligation. Nevertheless, the August 14 order and decision granted the FPC the power to order refunds in disregard of the statute.

The court below believed that its remedial order was not entirely outside the contemplation of the Act (8a). It attempted to support and justify the impermissible result which it reached by relying on this Court's decisions in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) and *United States* v. *Morgan*, 307 U.S. 183 (1939). Those decisions, we submit, do not stand as authority for an appellate court, which is statutorily powerless to order a given remedy, to call upon some inherent equitable powers to achieve that which the enabling statute forbids. To rely on those cases for such a proposition distorts them beyond all proportion, because in each case Congress had specifically granted to the reviewing court the equity powers which it invoked.

A careful reading of the *Ford* opinion indicates that this Court held that a court reviewing action of the Labor Relations Board is, by virtue of specific wording in the pertinent judicial review section of the NLRA, vested with equity powers. Section 10(e) of the NLRA, unlike Section 313(b) of the Act here involved, endows a reviewing court with the power to,

> "* * * grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

In light of this clear grant of equity powers, allowing the court to fashion remedies as justice requires, the *Ford* Court concluded that the lower court could adopt an internal housekeeping shortcut which was consistent with the statutory scheme.

A proper reading of *Ford* results in the conclusion that reviewing courts under the NLRA are imbued with equity powers. This is a far cry from the proposition that all courts reviewing administrative action may exercise equitable powers to reach a result which is inconsistent with the essential features of a statutory scheme.

Yet the court below, in its August 14 opinion, so read this Court's decision in *Ford* relying on the following quotation from this Court's opinion:

> "*The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of*

> *the statute and without intruding upon the administrative province,* it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. * * * The 'remand' does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law." (emphasis supplied). *Ford, supra,* 373-74.

To infer from the quoted language, as did the court below, that it is vested when reviewing orders of the FPC with the powers of a court of equity, thus permitting it to fashion any remedy which it deems just under the circumstances, is clearly an improper reading of *Ford.* In the first instance, the *Ford* Court said, "the jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers" (*Id.* at 373), because the statute there involved specifically granted the reviewing court those powers. Section 10(e), NLRA. That specific statutory grant is a clear and unmistakable invocation of the powers of a court of equity, allowing the court great latitude in fashioning remedies as justice requires. Section 313(b) of the Act contains no such language and, therefore, cannot be said to invest the reviewing court with equity powers.

Likewise, the court below exceeded the limits of that portion of the *Ford* opinion which reads, "* * * while *the court must act within the bounds of the statute* and without intruding upon the administrative province, it may adjust

its relief to the exigencies of the case" (emphasis added) *Ford, supra*, 373. The court below asserted,

> "[W]e are acting, *we believe* 'within the bounds' of the Federal Power Act; indeed, our main opinion promotes the Act by confining the Commission to its statutory authority, and this supplemental opinion is designed to advance the policies and procedural safeguards of section 205 of the Act." August 14, 1974 opinion, 8a. (emphasis supplied)

Clearly the court was not acting within the bounds of the Act. It had held that Section 205 of the Act forbids the suspension of rates which have become effective, and both the February 14 and the August 14 opinions stated unequivocally that I&M's rate increase had become effective on July 14, 1974. Nevertheless, the court retroactively "suspended" I&M's rate increase.

Furthermore, the court itself recognized in both of its opinions that Section 206 of the Act, rather than Section 205, was the sole dispositive statutory provision in the instant proceeding (5a-6a and 25a-27a). Section 206 provides no suspension or refund powers, its only effect being to afford prospective relief in appropriate cases. In spite of this, the Court of Appeals issued a retroactive suspension order and bestowed upon the FPC the concomitant power to order refunds, thereby not only failing to act within the boundaries of the enabling statute, but also violating the essential features of that statute by exercising powers which neither it nor the FPC possessed.

Beyond this, while the court below recognized that under *Ford* it could not permissibly intrude "upon the adminis-

trative province" (*Ford, supra,* at 373-74), the court below did precisely that, and this subject will be discussed more fully at Point II, *infra.*

For all of the foregoing reasons, it is readily apparent that the Court of Appeals' reading of the *Ford* opinion was erroneous, at least insofar as it derived its claimed inherent equitable powers from that source. The *Ford* opinion lends no support whatsoever for the court's August 14 decision, and, quite to the contrary, shows that the court exceeded its authority.

The *Morgan* case is equally unsupportive of the exercise of equity powers by the court below. A cursory reading of that decision establishes that this Court merely held that a court which has previously exercised its equitable jurisdiction in a statutorily-mandated injunctive proceeding might continue to exercise equity powers to prevent an abuse of the court's process.

Therefore, *Morgan* and *Ford* are similar in that they both condone the exercise of equity powers by a court reviewing administrative agency action, only when, and to the extent, such powers have been statutorily granted by Congress. *See also Inland Steel Co.* v. *United States,* 306 U.S. 153 (1939) (where, as in *Morgan,* this Court sanctioned the use of equity powers to prevent distribution of funds accumulated solely by virtue of the court's process in a statutory, injunctive proceeding).

The instant case, however, is unlike *Ford, Morgan* and *Inland Steel.* Nowhere in the Act is the court given equitable powers of any kind. There is no provision in §313(b)

which grants the power to issue "such temporary relief or restraining order as it deems just and proper" (§10(e) and (f) of the NLRA) as was present in *Ford*. Nor is there a clause allowing the court, in its discretion, to "restrain or suspend, in whole or in part, the operation of the Commission's order" as was present in *Inland Steel, supra*, at 156.

There is additional case law which supports the conclusion that the instant case precluded the exercise of equitable powers or the grant of equitable remedies by the court below. *See, e.g., FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 582-83 (1949) (where this Court, relying on *Morgan* and *Inland Steel*, made clear that equitable powers exercised there were derived solely from the enabling statute and not from any amorphous, inherent equity powers) and *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U.S. 301 (1935) (where, in an equity action for restitution, brought pursuant to statute, this Court concluded that equitable relief was inappropriate).

Likewise, the Third Circuit decision in *Mississippi River Fuel Corp.* v. *FPC*, 202 F.2d 899 (3rd Cir.), petition dismissed on petitioner's motion, 345 U.S. 988 (1953), a case much relied on in the August 14 opinion, does not support the exercise of broad equitable powers to remedy administrative error. In *Mississippi*, the court ruled that the FPC had exceeded its statutory authority in summarily rejecting a proposed rate increase without a hearing. To remedy the error, the court ordered that the increased rate take effect, subject to refund, as of the date of its refiling. This conclusion was mandated because the maximum 30-day no-

tice period and five-month suspension period had both elapsed as a result of the FPC's error.

The ultimate effect of the Third Circuit decision was not, as the August 14 decision alleges, to require a retroactive *de facto* suspension of several months. The decision merely allowed the new rate to take effect at the earliest possible moment that the statute would allow. The court could not order the rate to be retroactively effective because, unlike the present case where the FPC's error took place after the rate had taken effect, the error there, having occurred before the proposed effective date, prevented the rate increase from ever becoming effective without a subsequent refiling.

The *Mississippi* decision, therefore, does not support the proposition that a court reviewing orders of the FPC may exercise equitable powers to alter a statutory command. Quite to the contrary, that case supports the conclusion that a court which lays bare an error by the FPC must, because of the absence of a grant of equitable powers, stay within the boundaries of the Act in fashioning any remedial order. *Accord, Tennessee Valley Municipal Gas Ass'n.* v. *FPC,* 470 F.2d 446 (D.C. Cir. 1972) (a case cited by the court as authority for its February 14 order and conspicuous by its absence in the August 14 opinion); *but see, Montana Power Co.* v. *FPC,* 330 F.2d 781 (9th Cir. 1964) (an aberrational decision with no common law or statutory authority for the result reached).

The foregoing argument conclusively demonstrates that the court below, in reviewing the orders of the FPC, does not sit as a court of equity because the statute affording

the jurisdictional basis for the review power specifically withholds from the court any equity powers. Since, in the instant case, §313(b) of the Act authorizes solely the exercise of powers of a court of law, it is evident that the Court of Appeals exceeded its jurisdictional and statutory authority by exercising the powers of an equity court.

The conclusion reached by the court below in its August 14 decision resulted from a serious misreading of this Court's decisions in *Ford* and *Morgan*. The importance of reversing the erroneous decision below lies in the fact that it fosters the conclusion that the judicial branch may expand its own jurisdiction with impunity. At the same time, that decision permits the judicial branch to employ the very administrative remedies which Congress has seen fit to withhold both from the FPC and the courts. That such powers should accrue to the federal courts as the result of a misinterpretation of this Court's decisions would be an anomalous result.

POINT II

The opinion below conflicts in principle with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

Section 205(e) of the Act, 16 U.S.C. 824d(e), authorizes the FPC to suspend proposed rate increases pending a hearing on their reasonableness:

> "[P]ending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may

> suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect. * * *"

It is well-established that the FPC's suspension power is absolute and exclusive and the court below so held (10a); *Pennsylvania Gas & Water Co.* v. *FPC*, 463 F.2d 1242 (D.C. Cir. 1972).

Nevertheless, in spite of the axiomatic nature of the proposition that the Act vests exclusive suspension powers in the FPC, the Court of Appeals here issued an order, the effect of which was retroactively to suspend a rate increase more than two years after it had become effective; clearly, the FPC was itself statutorily precluded from imposing such a result. The August 14 opinion had the additional effect of impermissibly extending the 30-day maximum waiting period for a filing utility under Section 205(d). The court below recognized the inflexible nature of this provision when it said,

> "The Supreme Court has interpreted this language to create not only a *minimum notice period* for the utility's customers and the Commission, but also a *maximum waiting period for the filing utility.* (citing *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958)). * * * Thirty days is the maximum a utility can be compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power." (February 14, 1974 opinion at 23a-24a; *see also, Id.* at 26a, and cases cited at fn. 34.)

This Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963) indicates that

the August 14 opinion constituted an impermissible intrusion into the administrative domain and exceeded the court's authority. In *Arrow*, which arose under analogous portions of the Interstate Commerce Act, the ICC suspended for the maximum seven-month period a certain schedule of reduced railroad rates on multiple-car grain shipments. At the end of the seven-month suspension period, the ICC had not completed its investigation into the lawfulness of the rates, and suit was brought to enjoin the implementation of the proposed rates pending the ICC's decision thereon.

The District Court concluded that the ICA vested exclusive suspension power in the ICC and that it lacked jurisdiction to grant injunctive relief extending the period of suspension. The Court of Appeals for the Fifth Circuit affirmed noting that,

> "Congress, in its wisdom, has fixed seven months as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are in effect amending the statute and that is a matter beyond their power." 308 F.2d 181, 186.

This Court affirmed, holding that Congress not only intended to vest ICC with exclusive power to suspend proposed rate changes, but also intended to withdraw from the courts any pre-existing power to grant equitable relief. Therefore, the Court held, the federal courts have no power to extend the suspension period beyond the time which Congress specified. *Arrow*, *supra*, at 667-69. The Court pointed out that judicial interference with the suspension power would be a clear violation of the Congressional mandate.

> "This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive. *The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the timing of rate changes which would be out of harmony with the uniformity of rate levels fostered by the doctrine of primary jurisdiction.*" (emphasis added) *Id.* at 668.

See also United States v. *SCRAP*, 412 U.S. 669 (1973); *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U.S. 264 (1933).

In conclusion, it is apparent that the August 14 opinion conflicts, if not directly, then in principle, with this Court's decision in *Arrow*. The Court's intervention is required here to prevent further judicial interference with the rate-making and rate-suspending powers exclusively granted by Congress to the FPC. A failure to review the erroneous decision below will not only play havoc with established norms of judicial review of administrative agency action, but will also be conducive to the notion that the FPC and other administrative agencies may act haphazardly, confident that the reviewing courts will, by exercising ombudsman-like jurisdiction, find methods to grant to them the very powers which were denied them by Congress.

POINT III

The opinion below represents such a clear departure from the permissible scope of administrative review as to require the exercise of this Court's supervisory power.

The scope of judicial review of the Court of Appeals when reviewing action taken by FPC is severely circumscribed by Congress, Section 313(b) of the Act, to the power only to "affirm, modify or set aside in whole or in part" an FPC order. *Id.*

This Court's decision in *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952) outlines with great precision the exact boundaries of a reviewing court's power under Section 313(b). In *Idaho Power*, the appellate court had specified the exact modifications to be made in an FPC order which had been declared invalid. This Court's decision, delivered by Mr. Justice Douglas, reversed saying,

> "But the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37.
>
> The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part,' §313(b). But that authority is not power to exercise an essentially administrative function. See *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364, 373-374; * * *" *Id.* at 20-21.

The Court's reference to *Ford* demonstrates that even when a court was statutorily vested with equity powers, it was unable to engage in essentially administrative functions.

The decision below violates the unambiguous meaning of *Idaho Power*. The court's function ceased when it laid bare the administrative error by issuing its February 14 opinion. At that time the court's statutory obligation had been fulfilled and it could do no more. Nevertheless, the Court of Appeals, being dissatisfied with the prospective remedies provided by Congress in Section 206 of the Act, ordained retroactive relief of a type which the FPC itself could not award.

The very nature and function of a court reviewing administrative agency action precludes the ordering of that which the agency itself may not order. Such a reviewing court has the limited function of enforcing the provisions of the enabling statute by ensuring that the agency complies with them. See *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973). It can do no more to carry out the statute's intent than that which the statute authorizes. In *FTC* v. *Eastman Kodak Co.*, 274 U.S. 619, 623-24 (1927), the principle was stated as follows:

> "It [the FTC] has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order *is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission*; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

See also Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

The decisions in *Alaska Steamship Co.* v. *FMC*, 362 F.2d 406 (9th Cir. 1966) and *Phillips Petroleum Co.* v. *FPC*, 227

F.2d 470 (10th Cir. 1955), *on remand* 15 FPC 1116 (1956), both demonstrate the proper course of review in like circumstances. In each case the agency failed to suspend rates because it was under a legal misconception as to certain procedural requirements. The result in each case was to allow certain rates to become effective that would not have been effective had it not been for agency error. In each case, the court recognized that its function ceased upon a finding of agency error. The remedies enacted by Congress were permitted to take their prescribed course in each case so that in *Alaska* the new rate took immediate effect, not subject to refund, and in *Phillips* the company was permitted to collect its rate retroactively as of the original effective date. In neither case did the court attempt, as here, to circumvent the Congressional mandate.

The foregoing analysis demonstrates that the Court of Appeals' decision so far departed from the accepted and usual course of administrative review as to require the interposition of this Court. As the late Justice Frankfurter pointed out,

> "The present case makes timely the reminder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' * * * Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 136 (1940).

By legislating administrative remedies which Congress has chosen to withhold, the court below evidenced a disregard of this principle.

Conclusion

The opinion below misconstrues this Court's decisions in *Ford* and *Morgan*, neither of which supports the invocation of "inherent equity powers" on the facts here presented. Review by this Court is necessary to preserve the integrity of its decisions.

Likewise, the Court of Appeals' opinion flies in the face of the unambiguous principles enunciated in *Arrow*. This Court's intervention is required not only to prevent further judicial incursions into the administrative domain, but also to restore the authority of its decisions in this field.

Finally, the opinion below represents an unauthorized expansion of the jurisdiction of the federal courts. The court below, without statutory authority, legislated an administrative remedy under the guise of the exercise of equity jurisdiction. In doing so, the court so completely disregarded accepted norms of judicial conduct as to warrant the interposition of this Court's supervisory powers.

We take the liberty of suggesting that, should this Court consider the errors below so clear as not to require the Court to place this case on its calendar for oral argument, this matter could be effectively handled by summary reversal with appropriate directions to the court below to reinstate its judgment of February 14, 1974 *in toto*.

Respectfully submitted,

PETER J. SCHLESINGER
Counsel for Petitioner
One Battery Park Plaza
New York, New York 10004

Of Counsel:
SIMPSON THACHER & BARTLETT

November 12, 1974